85-208 (1)

Supreme Court, U.S.
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No. 85-

IN THE

Supreme Court of the United States

October Term, 1985

EDWARD HILL LOVITT,
wwi Ermie Lovitt,
Debtor.

GORDON H. CHEADLE, et ux,
Appellants,

v.

APPLEATCHEE RIDERS ASSOCIATION, et al.,
Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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168 pp

QUESTIONS PRESENTED FOR REVIEW

The following questions are submitted for the review of this Court:

I.

Does a stranger to a bankruptcy proceeding have standing in bankruptcy to clear title to an asset by seeking a vacation of a trustee's sale of the asset made in good faith at a public sale on competitive bids?

II.

Assuming a stranger to a bankruptcy case has standing in bankruptcy court to clear title to an asset sold in good faith by a trustee at a public sale, does Federal Rule 60(b) require that such an action be taken within one year following the entry of the order confirming such a sale?

III.

Does the bankruptcy court have jurisdiction to hear a civil non-bankruptcy claim made by a stranger to the bankruptcy proceeding regarding the title to property over which the stranger asserts the bankruptcy court had no subject matter jurisdiction in the first instance?

IV.

Is a bankruptcy court deprived of subject matter jurisdiction over a debtor's interest in a lease or an executory contract, where, because of the failure of the debtor to schedule the asset, or in any way disclose it to a bankruptcy court, it does not come to the bankruptcy trustee's attention until more than 60 days after his qualification?

V.

As to unscheduled and undisclosed executory contracts and leases, does the bankruptcy law by a statutory conclusive presumption deprive creditors of the benefit of the value of assets which are not discovered by a trustee during the period of 60 days following his qualification?

PARTIES TO PROCEEDINGS

The following is a list of all parties to these proceedings:

Edward Hill Lovitt, whose wife's name is Ermie Lovitt, are the bankrupts.

Gordon H. Cheadle and Patricia J. Cheadle are the petitioners herein, and are creditors of the bankrupts' estate.

Sheena R. Aebig is the successor trustee of the Lovitt bankruptcy estate.

Appleatchee Riders Association, Cyprus Mines Corporation, and Asamera Minerals (U.S.) Inc. are the respondents herein, and are claimants to the bankrupts' interest in certain mineral leases in Chelan County, Washington.

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EDWARD HILL LOVITT,
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GORDON H. CHEADLE, et ux,
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APPLEATCHEE RIDERS ASSOCIATION, et al.,
Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals is contained in *Cheadle et al. v. Appleatchee Riders Assoc.*, 757 F.2d 1035 and was filed April 9, 1985; the denial of petitioner's petition for rehearing was filed on May 10, 1985. Copies of the opinion and the order denying rehearing are attached to this petition and included in the appendix hereto. Also included in the appendix are the decisions of the United States District Court and the court of first instance, the bankruptcy court.

JURISDICTION

The opinion of the Court of Appeals was filed April 9, 1985, and the denial of petitioner's petition for rehearing was filed May 10, 1985. The issues which petitioner urges this court to review involve substantial questions of the interpretation and meaning of pertinent federal bankruptcy laws. This court has jurisdiction and this petition for writ of certiorari has been brought pursuant to 28 USC §2010(c).

STATUTES INVOLVED

The resolution of this issue required the Court of Appeals to determine the applicability of §70(b) of the Bankruptcy Act, 11 USC§110(b) (1970) as amended by Bankruptcy Rule 607 relating to a bankrupt's unscheduled, unexpired leases.

Because the Lovitt bankruptcy petition was filed in 1973, the appeal is governed by the former Bankruptcy Act of 1898 as amended, 11 USC §1 *et seq.* (1970), and not the 1978 amendments. §403(a) of the Bankruptcy Reform Act, Public Law No. 95-598, 92 Stat. 2549 (1978) provides that "... a case commenced under the Bankruptcy Act, and all matters and proceedings in or relating to any such case, shall be conducted and determined under such Act as if this Act had not been enacted." See also *In Re Cochise College Park, Inc.*, 703 F.2d 1339, 1344 n. 1 (9th Cir. 1983).

The 1978 amendments to the Bankruptcy Code adopted 11 USC §365(d)(1) as the successor and counterpart of §70(b) as modified by Bankruptcy Rule 607. The Court of Appeals stated in Footnote 2 to the opinion in question: "The analysis employed by courts in cases arising under §365(d)(1) of the Bankruptcy Code is relevant to this discussion, however, because §365(d)(1) contains an analogous provision which deems executory contracts and unexpired leases rejected if they are not assumed within a 60-day period from the date of the order for relief."

The verbatim provisions of these statutes are set out in the appendix to this petition.

STATEMENT OF THE CASE

These proceedings were commenced by a motion filed on February 10, 1984 by the respondents, "to vacate an order of sale and quit claim deed" in the bankruptcy court in the United States District Court for the Western District of Washington at Seattle. Respondents (hereafter "Asamera") claimed the order of sale and deed issued pursuant to authority of the bankruptcy court clouded their title. Petitioner Cheadle as grantee of the deed was joined along with the trustee in bankruptcy, Sheena R. Aebig. The order of sale and the quit claim deed covered certain mining leases in Chelan County, Washington.

The motion was made in the bankruptcy estate of Edward Hill Lovitt, which at the time of the motion was being administered by Sheena R. Aebig, successor trustee. Trustee Aebig had sold at public sale on September 29, 1981, approximately two and a half years prior to respondents' motion, the two mining leases in question which she and Cheadle had discovered through independent efforts. *The leases were neither scheduled by the bankrupt nor in any way disclosed to the trustee.*

Only after the sale of both leases to Cheadle were the interests of Asamera brought to the attention of the court and trustee, notwithstanding the fact that Asamera had been negotiating for the properties with the bankrupts' attorney since prior to the filing of this bankruptcy in 1973. One lease (Leavers) was disclosed in 1980 by a recording of an alleged assignment from the bankrupt to Cyprus Mining Company which was executed in 1976 during the pendency of the bankruptcy proceedings. The other lease (Riggs/Chappelle) was disclosed by a recording in 1984, after the sale to Cheadle, of an alleged termination of the Lovitt lease by the lessee. This instrument also was purported to have been signed by the lessee in 1976 during the pendency of the bankruptcy.

Asamera argued to the bankruptcy court that the trustee's sale to Cheadle should be set aside because it clouded the title to mineral rights they claimed to own by virtue of the same leases, notwithstanding the fact that Asamera Minerals was the only competing bidder against Cheadle at that very sale. Asamera argued to the bankruptcy court that paragraph 70(b) of the Bankruptcy Act as then in force and modified by Rule 607, required that a trustee either assume or reject an executory contract or unexpired lease within 60 days after qualification.

The trustee and Cheadle argued in opposition to the motion that the moving parties, after waiting two and one half years, had no standing before the bankruptcy court, and that paragraph 70(b) and Rule 607 do not bar the administration of such assets which are neither scheduled nor brought to the attention of a trustee.

The bankruptcy court, by the same judge who administered the Lovitt estate throughout its 10-year pendency, denied the motion of Asamera, and an appeal was taken to the United States District Court for the Western District of Washington at Seattle. The property underlying the leases in question is in Chelan County, Washington, and thus within the jurisdiction of the federal District Court for the Eastern District of Washington.

The United States District Court reversed the decision of the bankruptcy court, ruling that 70(b) is jurisdictional as to executory contracts and leases, and that a bankruptcy trustee *must* discover them within the appropriate period of time in order for a bankruptcy court to secure subject matter jurisdiction over them, *even if discovery is impossible.*

The trustee and Cheadle appealed this decision to the United States Court of Appeals for the Ninth Circuit. The Court of Appeals opinion dismissed the appeal of the trustee as untimely, but ruled on identical issues raised by petitioner

that paragraph 70(b) constitutes a conclusive presumption against the jurisdiction of a bankruptcy court over executory contracts and leases which are not assumed within 60 days of a trustee's qualification, notwithstanding the fact that they are neither scheduled *nor* brought to the attention of the trustee by the debtor in any way, and that a nonparty to the bankruptcy proceeding may bring a motion in the bankruptcy court to quiet title to such property sold by a trustee.

ARGUMENT IN SUPPORT OF WRIT

1. The Decision Of The Court Of Appeals Constricts The Jurisdiction Of the Bankruptcy Court, Impeding Its Ability To Achieve One Of The Basic Foundations Of The Code.

In *Burlingham v. Crouse*, 228 U.S. 459, 473; 33 S.Ct. 564, 57 L.Ed. 920 (1913) this court declared that the twofold purpose of the Bankruptcy Act was " . . . to convert the estate of the bankrupt to cash and distribute it among creditors *and* then given the bankrupt a fresh start . . . " (emphasis added). However, the decision of the Court of Appeals interprets Section 70(b) and its related Bankruptcy Rule 607 as to impede one of the two main purposes of the entire Bankruptcy Act; namely, the distribution of assets to creditors. The last ten years has witnessed in this country a surge of new filings in bankruptcy cases.

The bankruptcy court in the Western District of Washington has experienced and increase in Chapter 7 filings from 8500 in January of 1982 to 23,634 as of January 31, 1985. This is not merely a local phenomenon, but is a national trend.

Confronted with huge unexpected losses, creditors are entitled to explore all ways to maximize [the distribution on their claims] by a fair determination of what assets can be sold to at least partially satisfy the bankrupt's debts. Rule 70(b), properly construed, should constitute a rule of procedure and not one of subject matter jurisdiction over unexpired leases and executory contracts.

In cases where a bankrupt breaches his responsibility to truthfully and accurately disclose his assets, the decision of the Court of Appeals for the Ninth Circuit unfairly burdens a liquidating Chapter 7 bankruptcy trustee with a 60-day deadline without even considering actual and potential misconduct of the bankrupt. This strikes at the very heart of one of the basic purposes of the entire Bankruptcy Act, which is to distribute the non-exempt assets of a bankrupt to creditors. The effect of the Ninth Circuit holding will increase the instances where creditors of bankrupts will be denied the benefits of the Bankruptcy Act.

2. The Decision of the Court of Appeals Expands the Jurisdiction of the Bankruptcy Court to Hear Non-bankruptcy Issues, such as Actions to Quiet Title and Removing Clouds on Title.

The decision of the Court of Appeals promotes the use of the bankruptcy court as a court of general jurisdiction for the determination of not only questions of title, but for the resolution of issues involving any "protectable" interest. The Court of Appeals in its opinion relied upon paragraph 76 of the *Restatement (Second) of Judgments* (1980), not by analogy, but directly grafting the *Restatement* to the bankruptcy statutory scheme. The United States Court of Appeals for the Seventh Circuit has ruled that in order to litigate in the bankruptcy context, one must first show that the interest which one seeks to protect is an interest which "the Bank-

ruptcy Act seeks to protect or regulate." *In Re Harwald Co.*, 497 F.2d 443, (7th Cir. 1974). The equitable power of the bankruptcy court may only be exercised within the limits of the jurisdiction established by the Bankruptcy Act, and the powers conferred on bankruptcy courts by the Bankruptcy Act do not make them courts of general jurisdiction to hear and determine controversies not properly a part of bankruptcy proceedings. *In Re Harwald Co., supra*, p. 445. It is not the intention of the Bankruptcy Act to expand the bankruptcy court's jurisdiction by the incorporation of the *Restatement (Second) of Judgments* by reference of a Court of Appeals.

The successful parties below are neither creditors nor claimants in the bankruptcy case of Edward Hill Lovitt, but claim the right to litigate in bankruptcy court to remove a cloud on title. The decision of the Court of Appeals would in effect expand the jurisdiction of the bankruptcy court to act as a court of general jurisdiction to hear the claims of parties which should be brought in a state forum of general jurisdiction for the quieting of title and for the removal of clouds on title.

3. Assuming — Arguendo Only — That Non-Parties to a Bankruptcy Have Standing to Raise and Litigate an Issue Involving Title to Property Sold by a Bankruptcy Trustee, Does Federal Rule Of Civil Procedure 60(b) Govern such Litigation, Requiring the Motion to be Brought Within One Year After the Entry of the Questioned Order?

Rule 60(b) FRCP provides that a motion for relief from a judgment is to be made within one year unless the judgment is void. The Court of Appeals did not expressly rely on Rule 60(b), but found procedural justification for granting Asamera's motion in the *Restatement (Second) of Judgments*, §76 (1980), which relates to the rules of *res judicata*. However,

the Court of Appeals indicated that if Rule 60(b) were applicable, its operation would not preclude Asamera's motion to vacate, because the order of sale constituted a "void judgment" and motions to set aside void judgments may be made at any *reasonable time.* The Court of Appeals ruled that Asamera's delay of two and one-half years was within a reasonable time because Cheadle failed to provide Asamera with notice of the reopening of the bankruptcy estate and the sale of the leases. However, it is an admitted fact that the Bankruptcy Act does not provide for such notice to persons in such situations as was Asamera. Thus a judgment was rendered void for lack of an unrequired notice.

The decision of the Court of Appeals thus creates a rule requiring notice to all suspected or undisclosed interests, known or unknown, with the risk of having a bankruptcy sale set aside as a consequence. This renders all bankruptcy trustee's sales vulnerable to attack at any time. The one-year limitation of Rule 60(b) must apply to bankruptcy sales, or else there is no limit to the litigation which can ensue over titles transferred by trustees in Chapter 7 liquidation sales.

Some of the consequences of the holding of the Court of Appeals in this regard are as follows:

A. It is an undue burden on the bankruptcy process to make the bankruptcy courts insurers of title to the real estate interests which people are willing to purchase at liquidation sales. In the case at hand, the sale of these mineral leases provided to the creditors of the bankruptcy estate $7,770.00 which would not otherwise have been obtained.

B. The decision of the Court of Appeals not only encourages the nondisclosure of potentially valuable assets, but renders the bankruptcy court vulnerable to fraud.

C. The decision exposes bankruptcy Chapter 7 trustees to malpractice risks by forcing them not only to seek out assets which should have been scheduled in the first instance,

but also required them to search for people who may claim an adverse interest in any asset discovered or risk having their sales set aside.

D. Bankruptcy judges will be forced to permit, in bankruptcy court, nonparty interlopers to litigate on bankruptcy questions which are potentially adverse to the rights of creditors, whose interests the courts were created to protect.

E. Creditors will lose the benefit of the liquidated value of assets which people are interested in purchasing, notwithstanding defects in title.

4. A Trustee is Entitled to a Reasonable Time to Discover Undisclosed or Concealed Assets.

The Court of Appeals improperly applied to this case the ruling of *In Re Gravure Paper & Board Corp.*, 234 F.2d 928 (3rd Cir., 1956). In that case, it was held that a trustee's failure to assume or reject an executory contract or lease within the 60-day period of Rule 70(b) gave rise to a "conclusive statutory presumption of rejection" of the lease or executory contract. However, that case was concerned with scheduled and disclosed assets. Likewise, a reading of Rule 70(b) gives no indication of the intention of Congress to create a conclusive presumption of rejection as to executory contracts or leases which are concealed from and are unknown by a trustee in bankruptcy. Rule 70(b) was amended in the 1938 Act to include the 60-day automatic rejection rule. Prior to that time, a trustee had a reasonable time within which to act, depending upon the circumstances. See 24 *American Bar Association Journal*, 880 (1938). Enactment of Rule 70(b) and its successor Rule 607 never expressly indicated a change in a trustee's right to a reasonable time within which to assume or reject

unscheduled leases or executory contracts which are undiscoverable until after the expiration of 60 days. Trustees under Bankruptcy Chapters 11 and 13 have a reasonable time for the assumption or rejection of executory contracts, both under the 1938 Act and the 1978 Amendments. See 11 USC §365 and *Theater Holding Corp. v. Morrow*, 681 F.2d 102 (C.A.N.Y. 1982). Following or extending the rule of *In Re Gravure, supra*, to circumstances involving undisclosed or concealed assets is not provided for under Rule 70(b) or its current equivalent, 365(d)(1).

CONCLUSION

In summary, petitioner submits that a bankruptcy court and the creditors will be denied the benefit of the value of assets unless this court reviews the decision of the Court of Appeals.

Respectfully submitted,

Patrick W. Crowley, of
SIDERIUS, LONERGAN & CROWLEY
Attorneys for Petitioner/Appellants

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re:
EDWARD HILL LOVITT,
wwi ERMIE LOVITT,

Debtor.

NO. 84-4057

GORDON H. CHEADLE and
PATRICIA J. CHEADLE,
husband and wife,

Appellants,

v.

APPLEATCHEE RIDERS ASSOCIATION;
CYPRUS MINES CORPORATION; and
ASAMERA MINERALS (U.S.), INC.,

Appellees.

NO. 84-4103

APPLEATCHEE RIDERS ASSOCIATION;
CYPRUS MINES CORPORATION; and
ASAMERA MINERALS (U.S.), INC.,

Cross-Appellants,

v.

GORDON H. CHEADLE and
PATRICIA J. CHEADLE,
husband and wife,

Cross-Appellees..

NO. 84-4267
D.C. NO.
CV 84-430V

SHEENA R. AEBIG,
Successor-Trustee of Lovitt
Bankruptcy Estate,

Appellant,

v.

GORDON H. CHEADLE and
PATRICIA J. CHEADLE,
husband and wife;
APPLEATCHEE RIDERS ASSOCIATION;
CYPRUS MINES CORPORATION; and
ASAMERA MINERALS (U.S.), INC.,

Appellees.

Argued and Submitted March 7, 1985

Filed April 9, 1985

Appeal from the United States District
Court for the Western District of
Washington
Donald S. Voorhees,
District Judge, Presiding

SUMMARY

[1] "[A] trustee has an affirmative duty to investigate for unscheduled executory contracts or unexpired leases,

and . . . the statutory presumption of rejection of leases which are not assumed within sixty days from the date of the trustee's qualification is conclusive."

Debtor filed for banakruptcy in 1973, but failed to list two mineral leases on his schedule of assets. The trustee-in-bankruptcy took no action to assume the leases. The estate closed in 1978. In 1980, a creditor petitioned to reopen the bankruptcy because of other unscheduled assets discovered after its close. After the petition was granted, the creditor presented the two leases to the new trustee, who also took no steps to assume the leases. Without notice to the successors-in-interest to the leased property, the trustee sold the leases to the creditor, who then commenced quiet title actions against the successors-in-interest. The successors-in-interest moved to set aside the sale in the bankruptcy court.

The motion was denied, but on July 11, 1984, the district court reversed the denial, vacated the order confirming the sale, and ordered the trustee to return the consideration. The creditor's motion for reconsideration was denied on September 7, 1984. The trustee noticed an appeal from the denial of reconsideration on October 3, 1984.

The trustee's notice of appeal was untimely. Federal Rule of Appellate Procedure 4(a)(4) does not provide that the thirty-day period for filing a notice of appeal is not tolled by a motion for reconsideration. The Court had no jurisdiction to hear the trustee's appeal.

The successors-in-interest had standing in the bankruptcy court. [3] The cloud cast upon their title by the bankruptcy court's order confirming title on the creditor was an injury that could be remedied by an order vacating the sale.

"[W]here a non-party claims an interest in property which is affected by a judgment between others, the non-party may seek a determination that the judgment does not cloud his title." See Rest.2d of Judgments § 76.

[4] The motion to vacate the sale was timely. Fed. R. Civ. P. 60(b), which allows a party to move for relief from judgment, is not applicable to appellees because the received no notice of the sale proceedings. Appellees motion to vacate a void judgment can be made at any reasonable time.

[5] The trustee's failure to affirmatively assume the leases within sixty days of their qualification resulted in the rejection of the leases under 11 U.S.C. § 110(b) and Bankruptcy Rule 607. Since the leases had been rejected, the sale was a nullity.

[6] The concluive presumption of rejection applies even to unscheduled leases.

Affirmed.

OPINION

Before: FARRIS, ALARCON, and FERGUSON, Circuit Judges.

ALARCON, Circuit Judge:

Appellants Gordon H. Cheadle (hereinafter Cheadle) and Patricia J. Cheadle appeal from the district court's order vacating the trustee sale to Cheadle of two mining leases previousl owned by the debtor-in-bankruptcy, Edward Hill Lovitt. Appellant Sheena R. Aebig joins the Cheadles' appeal and further appeals from the portion of the district court's order which requires her, as successor trustee of Lovitt's estate, to return the consideration paid by Cheadle for the leaseholds. Appellees Appleatchee Riders association (hereinafter Appelleatchee), Cyprus Mines

Corporation (hereinafter Cyprus), and Asamera Minerals (U.S.), Inc. (hereinafter Asamera), who have ownership interests in the property covered by the leases,[1] cross-appeal from the district court's ruling striking the affidavit of Michael A. Small containing excerpts of the deposition testimony of Cheadle and Aebig. Appellees also move to strike Aebig's appeal on the ground that it was not timely filed.

---

[1]At the time of the sale, Cyprus was the successor lessor and fee owner of the real property originally included in one of the leases and Appleatchee was the successor lessor and fee owner of the property under the other lease. Subsequent to the sale, Asamera entered into agreements with Cyprus and Appleatchee relative to the properties and thereby became their successor-in-interest.

I

PERTINENT FACTS AND PROCEDURAL HISTORY

Edward Hill Lovitt filed for bankruptcy under Chapter 7 on behalf of himself and his wife on September 21, 1973, in the Bankruptcy Court for the Western District of Washington. This appeal concerns the fate of two mineral leases which named Lovitt as lessee. The first was executed on March 5, 1964 by Lovitt and lessors Stanley and Zena Chappelle and Maggie Riggs (hereinafter the Chappelle/Riggs lease). The second was executed on March 19, 1964 by Lovitt and lessors Mark and Mable Leavers (hereinafter the Leavers lease). Both leases were unexpired on the date that Lovitt filed for bankruptcy, but Lovitt failed to list either lease on his schedule of assets.

On October 11, 1973, the bankruptcy court appointed Fred Galer as Lovitt's trustee-in-bankruptcy. Although both

leases had been duly recorded under Lovitt's name in Wenatchee, Washington (where the property was located and where Galer's investigation of Lovitt's affairs occurred), Galer took no action to assume the leases, nor did he tender payment of the accrued and unpaid back rentals owing on the leases. Lovitt's estate was closed on January 30, 1978.

Cheadle, who had been involved in the bankruptcy from its inception as a creditor and as a purchaser of assets, filed an ex parte petition to reopen the bankruptcy on November 21, 1980, on the ground that unscheduled assets belonging to Lovitt had been discovered after the close of his estate. The petition did not list the two subject leases. Service of the petition to reopen was not made upon Appleatchee or Cyprus, who had by then succeeded to interests in the property covered by the leases.

The bankruptcy was reopened and Sheena Aebig was appointed successor trustee on November 25, 1980. On February 2, 1981, Cheadle provided Aebig with copies of both leases. Aebig took no action to assume the leases or to pay the accrued rentals. Instead, on July 30, 1981, Aebig obtained an ex parte order from the bankruptcy court authorizing her to sell without warranty her rights to the leases.

A notice of sale was filed on August 6, 1981, but was not served on Appleatchee or Cyprus. The sale was held on September 24, 1981. There were two bidders: Cheadle and Asamera. Aebig accepted Cheadle's bid and obtained ex parte orders confirming the sale of the leases to Cheadle on September 29, 1981, and October 22, 1981.

In September 1982, Cheadle commenced quiet title actions pertaining to the leaseholds in state court against Appleatchee, Cyprus and Asamera. On

January 26, 1984, appellees moved to vacate the bankruptcy court's order confirming the sale of the leases to Cheadle. The bankruptcy court denied the motion to set aside the sale by order dated February 27, 1984.

Appellees appealed to the district court, and on July 11, 1984, the district court reversed the decision of the bankruptcy court and vacated the order confirming sale. The district court also ordered trustee Aebig to return the consideration paid by Cheadle for the leases. Cheadle's motion for reconsideration was denied by the court's order on September 7, 1984.

Cheadle filed a notice of appeal from the district court's original order on August 6, 1984, and an amended notice of appeal from both the original order and the order on the motion for reconsideration on September 21, 1984. Appellees filed a timely cross-appeal from the district

court's order striking the affidavit of Michael S. Small. Trustee Aebig filed a notice of appeal from the court's ruling on the motion for reconsideration on October 3, 1984. Appellees filed a motion to dismiss Aebig's appeal as untimely on October 31, 1984. All appeals were consolidated by order of this court on November 29, 1984.

II

TRUSTEE AEBIG'S APPEAL

Appellees contend that Aebig's appeal is untimely because it was not filed within thirty days from entry of the district court's July 11, 1984 order. Aebig argues that Cheadle's motion for reconsideration extended the time to file her notice of appeal until thirty days from entry of the district court's September 7, 1984 order.

Federal Rule of Appellate Procedure 4(a)(4) provides that the thirty day period

for the filing of a notice of appeal does not begin to run until after the disposition of certain enumerated post-judgment motions. Cheadle's motion for reconsideration does not fit within any of the categories singled out in the Rule for special treatment. As appellees point out, Cheadle's motion is most properly characterized as a motion for rehearing under Bankruptcy Rule 8015. The Advisory Committee's note to Rule 8015 observes that the filing of a motion for rehearing does not toll the time for taking an appeal from a district court's judgment. See also Wayne United Gas Co. v. Owens-Illinois Glass Co., 300 U.S. 131, 137 (1937) (bankruptcy court's refusal to entertain motion for rehearing does not extend time for filing appeal; defeated party who does not file a timely appeal takes the risk that he may lose his right of appeal).

The time limits for filing a notice of appeal are "mandatory and jurisdictional." United States v. Robinson, 361 U.S. 220, 224 (1960). Because Cheadle's motion for reconsideration did not extend the time for appeal from the district court's July 11 order, Aebig's failure to file her appeal within thirty days of July 12, 1984, the date of entry of the district court's order, deprives this court of jurisdiction to hear her appeal.

III

APPELLEES' STANDING

Cheadle challenges appellees' standing to invoke the bankruptcy court's jurisdiction, arguing that (1) appellees are strangers to the sale of the leaseholds, and (2) Asamera cannot attack the validity of the judicial sale because it was an unsuccessful bidder for the leases. We reject both challenges.

In Allen v. Wright, ___ U.S. ____, 104 S. Ct. 3315 (1984), the Supreme Court reaffirmed the essential constitutional component of standing: the plaintiff must allege personal injury "fairly traceable to the defendant's allegedly unlawful conduct" which is "likely to be redressed by the requested relief." Id. at 3325 (citing Valley Forge Christian College v. Americans United for Separation of Church and State, Inc. 454 U.S. 464, 472 (1982)). The injury alleged must be actual or threatened injury suffered personally by the plaintiff. Valley Forge, supra, at 472.

In the present case, appellees plainly are aggrieved parties with standing to challenge the bankruptcy court's order. Their alleged injury is the cloud cast upon their title to the property covered by the leases. Such injury is a direct result of the bankruptcy court's order confirming

title in Cheadle, and could be remedied by an order vacating the sale.

Furthermore, where a non-party claims an interest in property which is affected by a judgment between others, the non-party may seek a determination that the judgment does not cloud his title. This principle is clearly set forth in the Restatement (Second) of Judgments § 76 (1980), and the Reporter's comment thereto:

> [A] person who is not bound by a judgment under the rules of res judicata may obtain a determination that the judgment is ineffective as to him . . . when: (1) the existence of the judgment jeopardizes a protectible interest of his; and (2) the character of his interest warrants his being given relief forthwith.
>
> . . . .
>
> The plainest case is a judgment between others that determines interests in property in which the non-party claims an interest. The judgment suggests that the party in whose favor it runs has some sort of valid interest in the property. This may cloud the non-party's title
>
> . . . .

This court has often looked to the Restatment of Judgments for guidance. See, e.g., In re Houtman, 568 F.2d 651, 653 n.2 (9th Cir. 1978) (citing the restatement (sic) of Judgments with approval and applying it to a bankruptcy appeal).

Finally, we need not address Cheadle's contention that as a mere unsuccessful bidder at the judicial sale of the leases, Asamera lacks standing to challenge the validity of the sale. Appellees' brief make clear that Asamera makes its claim solely in its capacity as a successor-in-interest to Cyprus and Appleatchee. Asamera does not raise any challenge to the technical propriety of the sale based upon the rejection of its bid.

IV

APPLICABILITY OF FEDERAL RULE OF CIVIL PROCEDURE 60(b) TO APPELLEES' MOTION TO VACATE

Cheadle further contends that Fed. R. Civ. P. (60(b) bars appellees' motion to vacate the bankruptcy court's order because the motion was made more than one year after entry of the order. We find that the plain language of Rule 60(b) renders it inapplicable to appellees' motion to vacate, and that even if it were applicable it would not bar appellees' motion.

Rule 60(b) provides a procedural mechanism for relief from a judgment on motion by "a party or his legal representative." Thus, a Rule 60(b) motion is maintainable only by a party (or his privy) to the original action. See National Acceptance Co. v. Frigidmeats, Inc., 627 F.2d 764, 766 (7th Cir. 1980); Ratner v.

Bakery & Confectionery Workers International Union, 394 F.2f 780, 782 (D.C. Cir. 1968); United States v. 140.80 Acres of Land, 32 F.R.D. 11, 14 (E.D. La. 1963). Because appellees were not parties to the ex parte proceedings in which the trustee sale of the leases was authorized and confirmed, Fed. R. Civ. P. 60(b) does not govern their motion to vacate the bankruptcy court's order.

Moreover, even if Rule 60(b) were applicable, its operation would not preclude appellees' motion to vacate. Cheadle apparently contends that appellees' motion was made upon one of the grounds specified in Rule 60(b)(1), (2), or (3), and is therefore subject to the one-year limitations period specified in the Rule for motions made upon those grounds. We disagree. As a motion to vacate a void judgment, appellees' motion was made pursuant to Fed. R. Civ. P. 60(b)(4) and is

not subject to the one-year limitation period; a motion to vacate a void judgment can be made at any "reasonable time." Fed. R. Civ. P. 60(b); 7 Moore's Federal Practice ¶ 60.25[4], at 60-241 (2d ed. 1983). Appellees' motion was filed within a reasonable time in light of Cheadle's failure to provide them with notice of the reopening of the Lovitt estate and the sale of the leases. Therefore, appellees' motion is not barred by the limitations period of Rule 60(b).

V

APPLICABILITY OF SECTION 110(b) AND BANKRUPTCY RULE 607 TO UNSCHEDULED ASSETS

The pivotal question on this appeal is whether the leases ever became a part of Lovitt's estate subject to the bankruptcy court's jurisdiction. Resolution of this issue requires us to determine the applicability of section 70(b) of the Bankruptcy

Act, 11 U.S.C. § 110(b) (1970) and Bankruptcy Rule 607 to a bankrupt's unscheduled unexpired leases.[2] We hold that a trustee has an affirmative duty to investigate for unscheduled executory contracts or unexpired leases, and that the statutory presumption of rejection of leases which are not assumed within sixty days from the date of the trustee's qualification is conclusive. Accordingly, trustee Aebig's failure to assume the unscheduled leases within sixty days from the date of her qualification resulted in rejection of the leases.

---

[2] Because the Lovitt bankruptcy petition was filed in 1973, this appeal is governed by the former Bankruptcy Act of 1898 as amended, 11 U.S.C § 1 et seq. (1970) and the Bankruptcy Rules thereunder, which were in effect at the time of such

Section 70(b) of the Bankruptcy Act provides, in pertinent part:

> The trustee shall assume or reject an executory contract, including an unexpired lease of real property, within sixty days after the adjudication or within thirty days after the qualification of the trustee, whichever is later, but the court may for cause shown extend or reduce the time. Any such contract or lease not assumed or rejected within that time shall be deemed to be rejected.

2continued

filing. Section 403(a) of the Bankruptcy Reform Act. Pub. L. No. 95-598, 92 Stat. 2549 (1978) provides that "[a] case commenced under the Bankruptcy Act, and all matters and proceedings in or relating to any such case, shall be conducted and determined under such Act as if this Act had not been enacted." See also In re Cochise College Park, Inc., 703 F.2d 1339, 1344 n.1 (9th Cir. 1983).

The act is modified by Bankruptcy Rule 607, which eliminates the date of adjudication as a triggering event for applying the presumption of rejection and refers exclusively to the date of the trustee's qualification. Rule 607 provides in relevant part as follows:

> Within thirty days after the qualification of the trustee, unless the court for cause shown extends or reduces the time, the trustee shall file a statement showing any executory contracts of the bankrupt,

---

[2] continued

The analyses employed by courts in cases arising under section 365(d)(1) of the Bankruptcy Code are relevant to this discussion, however, because section 365(d)(1) contains an analagous provision which deems executory contracts and unexpired leases rejected if they are not assumed within a sixty day period from the date of the order for relief.

> including unexpired leases, which the trustee has assumed . . . . Any such contract not assumed within sixty days after qualification of the trustee or within such further or reduced time as the court may allow within such sixty day period, shall be deemed to be rejected.

The trustee's power to reject those executory contracts which he finds burdensome to the bankrupt's estate is an extension of his power to renounce title to and abandon burdensome property which is already a part of the estate. See 4A Collier on Bankruptcy ¶ 70.43[1], at 516-17 (14th ed. 1978). Because executory contracts and leases involve future liabilities as well as rights, however, an affirmative act of assumption by the trustee is required to bring the property into the estate in order to insure that the estate is not charged with the liabilities except upon due deliberation. See In re Frazin, 183 F. 2d, 32 (2d Cir. 1910); 4A Collier on Bankruptcy ¶ 70.43[1], at 520

(14th ed. 1978). Thus, executory contracts and leases - unlike all other assets - do not vest in the trustee as of the date of the filing of the bankruptcy petition. They vest only upon the trustee's timely and affirmative act of assumption. In re Tonry, 724 F.2d 467, 469 (5th Cir. 1984); In re Cochise College Park, Inc., 703 F.2d 1339, 1352 (9th Cir. 1983); Fletcher v. Surprise, supra, at 676.

Because rejection of an executory contract is retroactive to the date of the filing of the bankruptcy petition, such a contract never becomes a part of the bankrupt's extate. In re Tonry, supra, at 469; In re Cochise College Park, Inc., supra, at 1352; Danning v. Brunswick Corp., 466 F.2d 1010, 1012 (9th Cir. 1972), cert. denied, 409 U.S. 1126 (1973); Fletcher v. Surprise, supra, at 676. A bankruptcy court has no judrisdiction over assets outside of the bankrupt's estate, and

therefore lacks authority to approve their sale or transfer. United States v. Neiwirth, 370 F. Supp. 929, 934 (D.N.J. 1974).

In the present case, it is undisputed that the unexpired leases fall within the purview of section 110(b) and Rule 607, and that trustees Galer and Aebig took no action to assume the leases within sixty days of their respective qualification dates. Therefore, both leases were rejected by operation of the statutes and the bankruptcy court was without jurisdiction to enter its order confirming the trustee sale. The district court's holding to this effect is directly supported by In re Gravure Paper & Board Corp., supra, wich we cited approvingly in In re Cochise College Park, Inc., supra, at 1351 n.10, 1352, 1356. Gravure made clear that once a trustee rejects a lease, he no longer has

any right, title or interest in the lease or its proceeds. Gravure, supra, at 930, 932. Consequently, the sale of an unassumed lease is a nullity. Id.

Cheadle contends that section 110(b) and Rule 607 were not intended to apply to unscheduled leases. We disagree. The statutory presumption of rejection by the trustee's nonaction within the sixty day period following his qualification is a conclusive presumption. In re Gravure Paper & Board Corp., 234 F.2d 928, 930 (3d Cir. 1956); Fletcher v. Suprise, supra, at 675-76; In re Shipley, 29 B.R. 13, 15 (W.D. Ky. 1983). Moreover, Bankruptcy Rule 607 imposes an affirmative duty on the trustee promptly to investigate the affairs of the bankrupt and to determine whether executory contracts or unexpired leases exist. In re Law, 1 B.R. 557, 559 (W.D. Va. 1979). In the present case, the trustees failure to

discover the existence of appellees' recorded interests in the property covered by the leases does not exempt the leases from the operation of the statutory presumption of rejection.[3] Therefore, the failure of both trustees to take any action to assume these leases within sixty days

---

[3]Appellees speculate that Galer's inaction resulted either from his conclusion that the leases were an asset of Wenatchee Mining Partnership, in which Lovitt retained no valuable interest at the time of the filing of the bankruptcy, or from his judgment that the rentals owing on the leases rendered them burdensome to the estate. There is no evidence, however, that Galer had actual knowledge of the leases within the sixty day period or that he made a conscious decision to reject them.

after their respective qualification dates resulted in rejection, and the subsequent trustee sale of the leases was a nullity.

VI

APPELLEES' CROSS-APPEAL FROM THE DISTRICT COURT'S EVIDENTIARY RULING

Because we find that there was no error in the district court's order reversing the bankruptcy court's order and vacating the sale of the the leases to Cheadle, we need not reach appellees' cross-appeal from the district court's order striking the affidavit of Michael A. Small.

The judgment is AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

D.C. No. CV 84-430V

In re:
EDWARD HILL LOVITT,
wwi ERMIE LOVITT,
Debtor.

No. 84-4057

GORDON H. CHEADLE and
PATRICIA J. CHEADLE,
husband and wife,
Appellants,

v.

APPLEATCHEE RIDERS ASSOCIATION;
CYPRUS MINES CORPORATION; and
ASAMERA MINERALS (U.S.), INC.,
Appellees.

No. 84-4103

APPLEATCHEE RIDERS ASSOCIATION;
CYPRUS MINES CORPORATION; and
ASAMERA MINERALS (U.S.), INC.,
Cross-Appellants,

v.

GORDON H. CHEADLE and
PATRICIA J. CHEADLE,
husband and wife,

Cross-Appellees.

B-2

NO. 84-4267

SHEENA R. AEBIG,
Successor-Trustee of Lovitt
Bankruptcy Estate,

Appellant,

v.

GORDON H. CHEADLE and
PATRICIA J. CHEADLE,
husband and wife;
APPLEATCHEE RIDERS ASSOCIATION;
CYPRUS MINES CORPORATION; and
ASAMERA MINERALS (U.S.), INC.,

Appellees.

ORDER

Appeal from the United States District
Court for the Western District
of Washington
Donald S. Voorhees,
District Judge, Presiding
Argued and submitted March 7, 1985

Before: FARRIS, ALARCON, and FERGUSON,
Circuit Judges.

The Opinion filed on April 9, 1985, in the above-entitled case has been amended as follows:

1. On page 7, at the end of the second paragraph add the following footnote 2:

> [2] Because Cheadle sought reconsideration in the district court rather than in the bankruptcy court, his motion was governed by Bankruptcy Rule 8015 rather than by Rule 8002(b); Rule 8002(b) applies to a motion for reconsideration in the bankruptcy court. Therefore, our decision in Branding Iron Steak House, 636 F.3d 299 (9th Cir. 1976) holding that a Rule 8002(b) motion to alter or amend a bankruptcy court's judgment tolls the time for appeal to the district court, is neither controlling nor applicable to the present case.

Because of the new footnote 2, the numbering of the following footnotes will change accordingly, i.e., the old footnote 2 becomes footnote 3, etc.

The petition for rehearing is DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

D.C.# CV84-430 V

In re:
EDWARD HILL LOVITT,
wwi ERMIE LOVITT,

Debtor.

NO. 84-4057

GORDON H. CHEADLE and
PATRICIA J. CHEADLE,
husband and wife,

Appellants,

v.

APPLEATCHEE RIDERS ASSOCIATION;
CYPRUS MINES CORPORATION; and
ASAMERA MINERALS (U.S.), INC.,

Appellees.

NO. 84-4103

APPLEATCHEE RIDERS ASSOCIATION;
CYPRUS MINES CORPORATION; and
ASAMERA MINERALS (U.S.), INC.,

Cross-Appellants,

v.

GORDON H. CHEADLE and
PATRICIA J. CHEADLE,
husband and wife,

Cross-Appellees.

JUDGMENT

APPEAL from the United States District Court for the Western Distict of Washington (Seattle).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Seattle) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in the Cause be, and hereby is affirmed.

Filed and entered 09 April 1985

APPENDIX C

[ent. 7/12/84]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

Appeal No. C84-430V
Bankruptcy No. 1435-73B2

In re:
EDWARD HILL LOVITT,
wwi ERMIE LOVITT,

Debtor.

ORDER

Having considered the issues presented by this appeal, together with the memoranda, affidavits and exhibits submitted by counsel, the Court finds and rules as follows:

1. The two leases in question are subject to Bankruptcy Rule 607, which states in pertinent part:

> Any such contract not assumed within sixty (60) days after qualification of the trustee, or within such further or reduced time as the Court may allow within such sixty (60) day period, shall be deemed rejected.

2. The successor trustee received notice of the existence of the leases on February 2, 1981. It is undisputed that no affirmative action was taken by the successor trustee to assume the leases within sixty days after her qualification. Because of her inaction, Rule 607 requires that the leases must be deemed conclusively rejected. In re Gravure Paper and Board Corp., 234 F.2d 928 (3rd Cir. 1956).

3. Since the leases were rejected by the successor trustee, they did not become part of the bankrupt's estate. In re Tonry, 724 F.2d 467 (5th Cir. 1984). the Bankruptcy Court was in consequence without power to authorize the successor trustee to dispose of leases which were not within the bankrupt's estate. The only effect of the trustee's sale was to cast a cloud upon the title to the leased property.

4. Appellants were not parties to the proceedings in which orders regarding the sale of the leases was issued. They are not foreclosed, however, from attacking those orders since the orders purported to affect interests in property to which appellants claim title. Restatement (Second) of Judgments, Section 76. Since the Bankruptcy Court was without jurisdiction over the leases in question, this Court is of the opinion that those orders may be vacated at any time.

Accordingly, the orders of the Bankruptcy Court authorizing and confirming the sale of the leases in question are VACATED. The trustee shall return the consideration paid by the purported purchaser of the trustee's right, title and interest in the leases.

The Clerk of this Court is instructed to send uncertified copies of this order to

all counsel of record and to Bankruptcy Judge Kenneth Treadwell.

DATED this 11th day of July, 1984.

s/Donald S. Voorhees
United States District Judge

C-5

[ent. 9/10/84]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

Appeal No. C84-430V
Bankruptcy No. 1435-73B2

In re:
EDWARD HILL LOVITT,
wwi ERMIE LOVITT,

Debtor.

ORDER

Having considered the motion of appellee for reconsideration of the Court's order of July 11, 1984, appeal, together with the memoranda, affidavits and exhibits submitted by counsel, the Court finds and rules as follows:

1. The Court found that the successor trustee received actual notice of the existance of the leases in question on or before February 2, 1981. That finding was based on exhibit B-12, attached to the

affidavit of M. Craig Haase. That affidavit was properly before the Court and was not part of the materials stricken by the Court in its order of July 11, 1984.

2. Contracts of which the trustee has actual notice are clearly within the scope of Bankruptcy Rule 607. The successor trustee failed to assume the leases within sixty days of her qualification, as required by the rule. Even if the successor trustee had no knowledge of the existence of the leases until February 2, 1981, such that the automatic rejection might be deemed to have been tolled or suspended until sixty days after that date, the successor trustee did not assume the leases within sixty days of February 2, 1981. In consequence, the leases must be presumed rejected by operation of Bankruptcy Rule 607.

3. As a result of that rejection the leases were never within the jurisdiction of the Bankruptcy Court. Any purported sale by the trustee of the leases was hence a nullity irrespective of the identity of those who may have bid at the sale.

Accordingly, the motion of appellee for reconsideration of the Court's order of July 11, 1984, is DENIED.

The Clerk of this Court is instructed to send uncertified copies of order to all counsel of record and to Bankruptcy Judge Kenneth S. Treadwell.

DATED this 7th day of September, 1984.

s/ Donald S. Voorhees
United States District Judge

APPENDIX D

[filed Feb. 27 1984]

KENNETH S. TREADWELL
Bankruptcy Judge
220 U.S. Courthouse
Seattle, Washington 98104
442-7545

IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF WASHINGTON, AT SEATTLE

No. 1435-73B2

In Re
EDWARD HILL LOVITT,
wwi ERMIE LOVITT,

Debtor.

MEMORANDUM AND ORDER ON MOTION TO VACATE

BACKGROUND

This action was commenced on January 26, 1984, upon the motion of Appleatchee Riders Association, Asamera Minerals, Inc. and Cyprus Mines Corporation to vacate an order confirming sale of the trustee's interest in two mining leases. Based upon the pleadings, memoranda and arguments of counsel the Court denies the motion for relief.

DISCUSSION

FACTS

For the purposes of this motion the following facts are relied upon:

On March 1, 1964, Mr. Lovitt, as named lessee, entered into two mining leases which are the subject of this motion. The leases contain similar provisions allowing the lessee to explore for minerals. On September 21, 1973, Lovitt filed for bankruptcy and failed to list the two leases on his asset schedule. Lovitt's case was closed on January 30, 1978, without an amendment to his asset schedule concerning the two leases.

On November 21, 1980, a petition to reopen Lovitt's case was filed by Mr. Cheadle mentioning possible unscheduled assets owned by Lovitt. By an order dated November 25, 1980, Lovitt's case was reopened and Sheena Aebig was apponited successor trustee. The trustee obtained an

order allowing the sale of "her rights of whatever nature" to the leases "without warranty of any nature." A notice of sale was properly filed and sent to Lovitt's creditors. An order confirming sale of the leases to Mr. Cheadle as highest bidder was entered on September 29, 1981, and a supplemental order was entered on October 22, 1981.

LAW

This proceeding involves a motion to vacate a previous order of this Court. Pursuant to Bankruptcy Rule 924, Rule 60 of the Federal Rules of Civil Procedure applies in bankruptcy cases to a motion for relief from a judgment or an order and is applicable to the motion herein.

Rule 60(b) provides that the motion for relief shall be made within a reasonable time and for reasons contained in 60(b)(1),(2), and (3) not more than one year after the order was entered. It is

well established, however, that a motion under Rule 60(b)(4) on the ground that a judgment is void is not subject to the time limitations contained in Rule 60(b). Marquette Corp. v. Priester, 234 F. Supp. 799 (E.D. S.C. 1964); New York State Health Facilities Assn., Inc. v. Carey, 76 F.R.D. 128 (D.C.N.Y. 1977); Sagers v. Yellow Freight Systems, Inc., 68 F.R.D. 686 (D.C. Ga. 1975); 11 Wright & Miller, Federal Practice and Procedure § 2862 (1973).

The motion herein was made more than two years after the order confirming sale was entered. Consequently, the time limitations of Rule 60(b) bar the motion made on any ground other than the order is void. The movants did assert this ground in their reply memorandum. Therefore, since all other grounds for relief are barred, the sole issue before the Court is whether the Order Confirming Sale is void.

In the sound interest of finality the concept of a void judgment must be narrowly construed. V.T.A., Inc. v. Airco, Inc., 597 F. 2d 220, 225 (10th Cir. 1979); Lubben v. Selective Service System Local Bd. No. 27, 453 F. 2d 645, 649 (1st Cir. 1972). The absence of subject matter jurisdiction may, in certain cases, render a judgment void. This occurs only where there is a total usurpation of power by the court, when thre is a "total want of jurisdiction" rather than an "error in exercise of jurisdiction." Kansas City Southern Ry. Co. v. Great Lakes Carbon, 624 F. 2d 822, 825 (8th Cir. 1980); Lubben, supra. A void judgment must be distinguished from an erroneous one. Id.

In the present case movants argue that the order is void because the leases were not subject to the Court's jurisdiction. There argument is based on their contention that the leases were not the

property of the debtor or, assuming they were, they were not assumed by the trustee and, therefore, deemed rejected.

To support their position the movants rely on In re Gravure Paper Board Corp., 234 F. 2d 928 (3rd Cir. 1956). That case held that a sale by the trustee of his interest in a lease which the trustee had failed to assume within the prescribed time was invalid. The court was in accord with the construction of Section 70(b) that failure to adopt or reject a lease within the 60 day period amounts to a rejection. Id., at 930. Since the trustee had failed to assume the lease the sale was held invalid. Id.

In re Gravure, is not on point with the issue before this Court for two reasons. First, that case concerned the validity of a sale and not whether the court confirming the sale had jurisdiction. A court with proper jurisdiction may

erroneously allow a sale which later appears to be invalid. Confirmation of an invalid sale does not necessitate a conclusion that the court totally unsurped [sic] its power.

Assuming for argument that the sale was invalid, either because the leases were not Lovitt's property or because they were deemed rejected, this invalidity does not cause the Court's order confirming that sale to amount to a "total want of jurisdiction" to render the order void within the meaning of Rule 60(b)(4).

There was no usurpation of power by this Court in confirming the sale. At the time of the order this Court had before it a trustee desiring to sell two unscheduled leases in which the debtor was named lessee. After proper notice the leases were sold to the highest bidder. Nothing was presented to the Court which indicated that the leases were not the

property of Lovitt. A judgment based upon mistake of fact does not render the judgment void, but at best only erroneous and voidable and such a judgment is not subject to collateral attack. Sieland v. Hamel, 14 F.R.D. 20 (D.C. Mo 1953).

In re Gravure, is also factually distinguishable. In the case at bar the leases were not listed on Lovitt's schedules. Because the leases were unscheduled the trustee cannot be deemed to have rejected them. See, Texas Western Financial Corp v. McGrave Candies, Inc., 347 F. Supp. 445, 449 (N.D. Tex. 1972). Deemed rejection of an unscheduled lease would allow a debtor to preclude the trustee's control of a valuable lease by not scheduling it. It should also be noted that the movant in In re Gravure was the purchaser of the trustee's interest. The purchaser, herein, Mr. Cheadle, is not complaining about the sale.

For these reasons, it is therefore ORDERED that the motion for relief from Order Confirming Sale is denied.

DATED at Seattle, Washington, February 27, 1984

s/ Kenneth S. Treadwell
KENNETH S. TREADWELL
Bankruptcy Judge

APPENDIX E

Federal Rule of Civil Procedure 60(b) provides:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or preceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. . . .

No. 85-208

SUPREME COURT, U.S.
FILED
SEP 9 1986

IN THE

Supreme Court of the United States

October Term, 1985

EDWARD HILL LOVITT,
wwi Ermie Lovitt,
Debtor

GORDON H. CHEADLE and PATRICIA J. CHEADLE,
husband and wife,
Petitioners,

v.

APPLEATCHEE RIDERS ASSOCIATION,
CYPRUS MINES CORPORATION,
and
ASAMERA MINERALS (U.S.), INC.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Does a non-party to a bankruptcy proceeding have standing to attack the validity of an order entered in that proceeding which purports to dispose of the non-party's property?

2. Does Fed. R. Civ. P. 60(b) prohibit a motion to vacate a bankruptcy order more than one year after the order was entered, where the person seeking relief was not a party to the bankruptcy proceeding in which the order was entered and the motion to vacate alleges that the order is void?

3. Is the bankruptcy court a proper forum in which to assert that a prior order of that court was entered without jurisdiction?

4. Where a bankruptcy trustee has rejected executory leases by failing to assume them within 60 days following the trustee's qualification, or at any other time after the leases have been disclosed to the trustee, does the bankruptcy court lack jurisdiction over the leases?

The issue posed by Petitioners' question number 5 is encompassed in Respondents' question number 4.

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No. 85-208

IN THE

Supreme Court of the United States

October Term, 1985

EDWARD HILL LOVITT,
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GORDON H. CHEADLE and PATRICIA J. CHEADLE,
husband and wife,
Petitioners,

v.

APPLEATCHEE RIDERS ASSOCIATION,
CYPRUS MINES CORPORATION,
and
ASAMERA MINERALS (U.S.), INC.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Respondents accept the statement of Petitioners.

JURISDICTION

Respondents accept Petitioners' statement of jurisdiction but deny Petitioners' improper assertion that the issues Petitioners present are substantial.

STATUTES INVOLVED

Respondents accept the statement of Petitioners.

STATEMENT OF THE CASE

1. Course of Proceedings.

This case arises out of *ex parte* bankruptcy proceedings in which Petitioner Gordon H. Cheadle ("Cheadle") purchased two mineral leases from the successor trustee in the bankruptcy of Edward Lovitt. Cheadle then asserted superior title to the leases in quiet title actions in Washington State court, naming as defendants Respondents Appleatchee Riders Association, Cyprus Mines Corporation, and Asamera Minerals (U.S.), Inc. ("Appleatchee," "Cyprus," and "Asamera," respectively).[1] Respondents promptly moved the bankruptcy court to set aside its earlier orders confirming the sale of the leases to Cheadle. The bankruptcy court denied the motion, and Respondents appealed to the United States District Court for the Western District of Washington. The District Court reversed the bankruptcy court and vacated the sale, holding that the successor trustee had rejected the leases by failing to assume them and, therefore, could not dispose of them. Cheadle appealed to the United States Court of Appeals for the Ninth Circuit. The Court of Appeals affirmed the decision of the District Court, holding that the bankruptcy court lacked jurisdiction to dispose of the leases because neither the original nor successor trustees had assumed them within the time required by law.

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[1] Pursuant to Supreme Court Rule 28.1, Respondents state as follows:

1. Asamera is a wholly owned subsidiary of Asamera Minerals, Inc., a Canadian corporation. Asamera is affiliated by a joint venture agreement with Breakwater Resources, Ltd., a Canadian corporation.

2. Cyprus is a wholly owned subsidiary of Cyprus Minerals Company, a Delaware corporation. Prior to July 1, 1985, Cyprus Minerals Company (formerly Amoco Minerals Company) was a wholly owned subsidiary of Standard Oil of Indiana, Inc., a Delaware corporation.

2. Pertinent Facts.

Edward Lovitt filed for bankruptcy under Chapter 7 on September 21, 1973. Fred Galer was appointed bankruptcy trustee and proceeded to make an exhaustive examination of Lovitt's mining and other business affairs. Although both leases had been duly recorded under Lovitt's name in Wenatchee, Washington (where the property was located and where Galer investigated Lovitt's affairs), and even though Lovitt's attorney sent Galer one of the leases by letter, Galer took no action in regard to the leases. He neither assumed the leases nor tendered payment of the accrued and unpaid back rentals owing on them. Lovitt's estate was closed on January 30, 1978.

Cheadle, who had been involved in the bankruptcy from its inception as a creditor and as a purchaser of assets, filed an *ex parte* petition to reopen the bankruptcy on November 21, 1980. Cheadle claimed in his petition that he had discovered unscheduled assets belonging to Lovitt, but he omitted all mention of the two leases at issue here.

By the time the petition to reopen the bankruptcy was filed, Appleatchee had succeeded to the fee ownership of one of the leasehold properties. Cyprus, in turn, had acquired a leasehold interest in the Appleatchee property and had succeeded to fee ownership of a portion of the other leasehold property. Neither Appleatchee nor Cyprus, whose property interests were duly recorded, was served with the petition to reopen.

The bankruptcy was reopened and Sheena Aebig was appointed successor trustee on November 25, 1980. Cheadle chose not to provide Aebig with copies of the leases until February 2, 1981. Aebig, like her predecessor Galer, did not tender the accrued and unpaid rentals or otherwise attempt to assume the leases at any time. Indeed, Aebig took no action at all until July 30, 1981, when she obtained an *ex parte* order authorizing her to sell without warranty her rights to the leases. Neither Appleatchee nor Cyprus was served with notice of these proceedings.

A notice of sale was filed on August 6, 1981, but was not served on Appleatchee or Cyprus, even though they had an obvious interest in any prospective auction of their property. Two bids were received at the sale: one from Cheadle and one from Asamera. At that time, Asamera was a complete stranger to these properties, claimed no property rights under the leases, and was simply making a blind bid. Aebig accepted Cheadle's bid and obtained *ex parte* orders confirming the sale of the leases to Cheadle on September 29, 1981, and October 22, 1981. Following the bankruptcy sale, Asamera entered into agreements with Cyprus and Appleatchee relative to the leasehold properties. Asamera's claim in the case at bar derives solely from those agreements.

In September 1983, nearly two years after Cheadle had acquired his deed and following press announcements of a major gold find by Asamera, Cheadle commenced a quiet title action against, *inter alia*, Appleatchee, Cyprus, and Asamera. In those proceedings, Cheadle asserted superior title to the leases based solely on the quit claim deed he had obtained from Aebig. Promptly upon commencement of those proceedings, Respondents moved to vacate the bankruptcy sale, and the proceedings in the case at bar ensued.

REASONS WHY THE WRIT SHOULD BE DENIED

1. This Case Does Not Merit Supreme Court Review.

Cheadle has not shown any reason for this Court to exercise its certiorari jurisdiction. The Court of Appeals' decision does not conflict with the decision of any other court. Moreover, no substantial or novel issues are raised which require resolution by this Court. Accordingly, Cheadle's petition for writ of certiorari should be denied.

The decision of the Court of Appeals is mandated by statute and consistent with a uniform line of cases that recognize the limited jurisdiction of the bankruptcy courts

to dispose of unexpired leases of real property. Section 70(b) of the Bankruptcy Act, 11 U.S.C. § 110(b) (1970), and Bankruptcy Rule 607 unambiguously require that an executory lease be assumed by the trustee before the bankruptcy court can dispose of it. Any lease that is not assumed is conclusively deemed rejected and does not become part of the bankrupt's estate. The bankruptcy court has no power to dispose of an asset that is outside the bankrupt's estate. Because the executory leases at issue in this case were never assumed by either the original or successor trustees, the bankruptcy court had no power to dispose of them. For these reasons, the Court of Appeals' decision was entirely correct and accords with the decision of every other court that has considered this issue. *See In re Tonry*, 724 F.2d 467 (5th Cir. 1984); *In re Cochise College Park, Inc.*, 703 F.2d 1339 (9th Cir. 1983); *In re Gravure Paper & Board Corporation*, 234 F.2d 928 (3rd Cir. 1956); *Fletcher v. Surprise*, 180 F.2d 669 (7th Cir.), *cert. denied*, 340 U.S. 824 (1950); *Palmer v. Palmer*, 104 F.2d 161 (2d Cir.), *cert. denied*, 308 U.S. 590 (1939).

Cheadle does not question the central holding of this case, *viz* that the bankruptcy court lacks power to dispose of an executory lease that has not been assumed. Instead, Cheadle asserts that a trustee should be permitted more than 60 days to assume an executory contract under certain circumstances. But because the leases at issue here were not assumed *at any time*, Cheadle's argument is entirely beside the point. If modification of the 60-day requirement set forth in Section 70(b) of the Bankruptcy Act would ever be appropriate, it is not in this case.

Cheadle also asserts that Section 70(b) should be considered a "rule of procedure" that can be ignored in the discretion of the bankruptcy court. Section 70(b), however, requires that "the trustee *shall* assume or reject an executory contract, including an unexpired lease of real property, within a 60-day period." (Emphasis supplied.) Moreover, Section 70(b) provides that any lease "not assumed or rejected within

that time *shall* be deemed to be rejected." (Emphasis supplied.) Congress has thereby mandated a "conclusive statutory presumption of rejection" by a trustee's "non-action within the sixty-day period." *In Re Gravure Paper*, 234 F.2d at 930. As the Court of Appeals held, this presumption completely forecloses Cheadle's claim

2. Cheadle's Legal Arguments Ignore the Facts of This Case.

Cheadle asserts that the 60-day rule should not be applied in this case because the leases, according to Cheadle, were not disclosed. But the district court specifically found that Cheadle disclosed the leases to successor trustee Aebig on February 2, 1981, 69 days after her appointment as trustee. Cheadle did not challenge the district court's factual finding on appeal. Had Cheadle provided the leases to Aebig immediately upon her appointment as trustee, moreover, even Cheadle would concede that Aebig would have had only 60 days within which to assume them. Because the leases were in fact disclosed, Cheadle's argument on this point can be dismissed summarily.

Cheadle also suggests that the trustee should be given a "reasonable" time to assume unscheduled executory leases. Section 70(b) of the Bankruptcy Act, however, makes no distinction between scheduled and unscheduled leases. Even if this distinction had merit, it is irrelevant here. Because the leases were never assumed at any time, the bankruptcy court had no power to dispose of them, whether scheduled or not.

Cheadle suggests throughout his petition that the Court of Appeals' decision might, under other circumstances, permit fraud or misconduct by a bankrupt. Cheadle's parade of horribles ignores that there is not one scintilla of evidence in this case of any such wrongful conduct. Successor trustee Aebig was aware of the leases and simply elected not to assume them. The Court of Appeals did not have a case of misconduct before it; its decision has no application to such

a case. Courts construing the Bankruptcy Act can fashion appropriate rules to deal with misconduct where it occurs. *See Texas Western Financial Corp.* v. *McCraw Candies, Inc.*, 347 F. Supp. 445 (N.D. Tex. 1972).

3. The Bankruptcy Court Cannot Dispose of an Asset Which Is Not Part of the Bankrupt's Estate.

Cheadle asserts that the Court of Appeals' decision unduly restricts the ability of the bankruptcy court to distribute assets of the bankrupt to the creditors. The issue in this case, however, is not whether the bankruptcy court has the power generally to distribute assets, but whether it has the power to distribute assets that by law do not become part of the bankrupt's estate.

It is fundamental that the bankruptcy court "cannot sell property which has not come to [the trustee] under the Bankruptcy Act." 4B *Collier on Bankruptcy* ¶ 70.97[5] at 1147 and n. 43a (14th ed. 1978). *See also In re Texas Consumer Finance Corp.*, 480 F.2d 1261, 1266 (5th Cir. 1973); *United States v. Neiwirth*, 370 F. Supp. 929, 934 (D.N.J. 1974). Any contrary holding would create chaos by permitting the bankruptcy court to dispose of property that Congress has provided is not within the court's jurisdiction.

4. Respondents Presented Bankruptcy Issues to the Bankruptcy Court, And They Had Standing To Do So.

Cheadle suggests that the Court of Appeals' decision will allow the bankruptcy court to try quiet title actions arising under state law. But Respondents did not seek to litigate title to the leases in bankruptcy court. Rather, Respondents' motion addressed the bankruptcy court's jurisdiction to dispose of the leases. This motion raised questions of federal law, *viz* the proper construction of both Section 70(b) of the Bankruptcy Act and Bankruptcy Rule 607. Such fundamental questions of bankruptcy law are appropriately addressed to the bankruptcy court. This Court long ago held that a bankruptcy court always has jurisdiction to consider its own jurisdiction. *In re Tax Service Ass'n of Illinois*, 305 U.S. 160 (1938).

The Court of Appeals, relying on *Allen v. Wright*, ___ U.S. ___, 104 S. Ct. 3315 (1984), properly held that Respondents had standing to challenge the bankruptcy court's sale of the leases. Respondents alleged an injury to their property rights (i.e., a cloud on Respondents' title) which was directly traceable to the bankruptcy court's unlawful exercise of jurisdiction, and which could be redressed by a motion before the bankruptcy court. These allegations fully entitled Respondents to adjudicate their claims in the bankruptcy court.

Cheadle asserts that only creditors and other parties to a bankruptcy proceeding may invoke the bankruptcy court's jurisdiction. But it is established law that an order entered without jurisdiction may be collaterally attacked by one who was not a party to the proceeding. *Arenas v. United States*, 197 F.2d 418, 420 (9th Cir. 1952); *Bradley v. St. Louis Terminal Warehouse Co.*, 189 F.2d 818, 824 (8th Cir. 1951) (attacking a bankruptcy order). If trustee Aebig purported to sell Cheadle the Empire State Building, there would be no doubt about the "standing" of the owners of that building to have such a sale set aside. The case at bar is no different.

Section 76 of the Restatement (Second) of Judgments (1980) provides that a non-party whose property interests are adversely affected by a judicial decision may seek a determination that the decision is of no effect. The facts of this case demonstrate that the rule is both salutary and necessary. Without questioning the validity of Section 76 of the Restatement, Cheadle argues that the rule has no application in a bankruptcy proceeding. As the Court of Appeals noted, however, the Restatement (Second) of Judgments has often been relied upon in bankruptcy matters. *See, e.g., In re Houtman*, 568 F.2d 651, 653 n. 2 (9th Cir. 1978). Because Section 76 is directly on point, the courts below appropriately referred to it in this case.

5. Fed. R. Civ. P. 60(b) Does Not Bar a Motion By Non-Parties, and Its One-Year Time Limit Does Not Apply to a Motion to Vacate a Void Judgment.

Because Respondents were not parties to the *ex parte* proceedings in which the leases were sold, Fed. R. Civ. P. 60(b) by its terms does not govern their motion to vacate the bankruptcy court's orders. Cheadle has not questioned the Court of Appeals' holding in this regard. Accordingly, the court's determination that Rule 60(b) does not prohibit Respondents' motion should stand.

Even if Fed. R. Civ. P. 60(b) were applicable, it would not bar the Respondents' motion. The rule's one-year time limit does not apply to a motion to vacate a void order. Cheadle acknowledges this. Changing tack, he argues for the first time that the Respondents did not bring their motion within a "reasonable time." Quite apart from Cheadle's failure to raise this argument below, it is without merit. Respondents filed their motion in the bankruptcy court within three months after Cheadle had filed a quiet title action against them.

In any event, as Professor Moore states: "The theory underlying the concept of a void judgment is that it is legally ineffective — a legal nullity; and may be vacated by the court which rendered it *at any time.*" 7 *Moore's Federal Practice* ¶ 60.25[4] at 60-241 (emphasis supplied).

CONCLUSION

For the reasons stated above, Respondents respectfully submit that there is no reason for this Court to exercise its certiorari jurisdiction. The Petition for Writ of Certiorari should be denied.

DATED this 5th day of September, 1985.

Respectfully submitted,

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APPENDIX A

Bankruptcy Act, 11 U.S.C. § 110 (1970)

§ 70. Title to Property.

b. The trustee shall assume or reject an executory contract, including an unexpired lease of real property, within sixty days after the adjudication or within thirty days after the qualification of the trustee, whichever is later, but the court may for cause shown extend or reduce the time. Any such contract or lease not assumed or rejected within that time shall be deemed to be rejected. If a trustee is not appointed, any such contract or lease shall be deemed to be rejected within thirty days after the date of the order directing that a trustee be not appointed. A trustee shall file, within sixty days after adjudication or within thirty days after he has qualified, whichever is later, unless the court for cause shown extends or reduces the time, a statement under oath showing which, if any, of the contracts of the bankrupt are executory in whole or in part, including unexpired leases of real property, and which, if any, have been rejected by the trustee. Unless a lease of real property expressly otherwise provides, a rejection of the lease or of any covenant therein by the trustee of the lessor does not deprive the lessee of his estate. A general covenant or condition in a lease that it shall not be assigned shall not be construed to prevent the trustee from assuming the same at his election and subsequently assigning the same; but an express covenant that an assignment by operation of law or the bankruptcy of a specified party thereto or of either party shall terminate the lease or give the other party an election to terminate the same is enforceable. A trustee who elects to assume a contract or lease of the bankrupt and who subsequently, with the approval of the court and upon such terms and conditions as the court may fix after hearing upon notice to the other party to the contract or lease, assigns the contract or lease to a third person, is not liable for breaches occurring after the assignment.

APPENDIX B

Bankruptcy Rule 607

Assumption, Rejection, and Assignment of Executory Contracts

Within 30 days after the qualification of the trustee, unless the court for cause shown extends or reduces the time, the trustee shall file a statement showing any executory contracts of the bankrupt, including unexpired leases, which the trustee has assumed. Whenever practicable, the trustee shall obtain approval of the court before he assumes a contract. Any such contract not assumed within 60 days after qualification of the trustee, or within such further or reduced time as the court may allow within such 60-day period, shall be deemed to be rejected. If a trustee does not qualify, any such contract shall be deemed to be rejected at the expiration of 60 days after the date of an order directing that a trustee be not appointed, or at such earlier or later time as the court may fix within such 60-day period. On application by the trustee for authority to assign any contract he has assumed pursuant to this rule, the court shall determine the matter after hearing on notice to the other party to the contract.